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Decision 17-05-035 May 25, 2017

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Improve Public Access to Public Records Pursuant to the California Public Records Act.	Rulemaking 14-11-001 (Filed November 6, 2014)

ORDER MODIFYING DECISION 16-08-024 AND DENYING REHEARING OF MODIFIED DECISION

I. INTRODUCTION

Decision (D.) 16-08-024 is an interim decision in Rulemaking (R.) 14-11-001 that updates a process for submission of documents that are claimed to be subject to confidentiality protection. In order to overcome the inconsistency in how purportedly confidential information is submitted to the California Public Utilities Commission (Commission) whether in formal proceedings or otherwise, D.16-08-024 adopted a process for purposes of submission of information. That process consists of the submitting party providing a signed declaration setting forth the rationale for its request for confidential treatment.

In 2006, by D.06-06-066 as modified by D.07-05-032 (hereinafter "Modified D.06-06-066"),[1] the Commission adopted a confidential information submission process and mandated its use in all resource adequacy ("RA"), resource procurement ("procurement"), and renewables portfolio standard ("RPS") proceedings. That process included the use of a protective agreement and/or order, adopted by D.08-04-032, for use in all RA, RPS and procurement proceedings and which may also be used in all other Commission proceedings.

D.16-08-024 also "provides guidance for the development of the process that the Commission will use in determining whether a potentially confidential document

[1] Rulemaking (R.) 05-06-040.

can be disclosed, again with the goal of consistent treatment and prompt disclosure of non-confidential documents." (D.16-08-024 at p. 1.) The adopted guidelines are discussed at pages 19 through 21 of the challenged decision. As guideline number 6 provides, "[t]hese provisions are adopted to provide guidance for more detailed processes to be implemented either by subsequent order in this proceeding or a successor proceeding, or by adoption of a new GO [General Order] 66, and become effective upon adoption of that process by this Commission." (*Id*. at pp. 20-21.)

Applications for rehearing of D.16-08-024 were filed by: (1) The Wireless Association (known as "CITA"), and (2) jointly by Calaveras Telephone Company, Cal-Ore Telephone Company, Ducor Telephone Company, Foresthill Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Company, Pinnacles Telephone Company, The Ponderosa Telephone Company, Sierra Telephone Company, The Siskiyou Telephone Company, Volcano Telephone Company, Winterhaven Telephone Company (known as the "Small LECs"), and Consolidated Communications of California Company (formerly Surewest Telephone) (known as "Consolidated").

In general, the applications for rehearing allege that the D.16-08-024: (1) violated public utilities' due process rights, (2) failed to proceed in a lawful manner by exceeding the scope of the proceeding, thereby violating Commission Rules of Practice and Procedure, and (3) erroneously delegated authority to review allegations of protected status to the Legal Division and exceeds the scope of the proceeding. The Small LECs and Consolidated (hereinafter "joint applicants for rehearing") also request oral argument on their allegations.

Having reviewed each and every allegation of error made by CITA and by the joint applicants for rehearing, we are of the opinion there is no good cause for rehearing of the decision. However, for purposes of clarification, we will modify D.16-08-024 in the manner set forth below. Rehearing of D.16-08-024 as modified, is denied.

II. DISCUSSION

A. Rehearing Applicants' Allegations of Error Concerning the Guidelines and Processes

D.16-08-024 adopts six guidelines, set forth at pages 19-21, which shall apply to the Commission's review process of purportedly confidential information. The "guidelines" are explained as follows:

> The basic idea underlying these guidelines is that the process that the Commission and its staff uses for reviewing documents should be as consistent as possible across industries, and for both previously submitted documents and documents submitted in the future. For this to happen, we need to ensure that similar submission practices are followed by all industries; this is somewhat challenging, given the past differences in practices across industries and the fact that we are not imposing the submission requirements retroactively. This is an interim and preliminary decision establishing an approach and providing guidance for going forward; the details and processes to effectively and efficiently implement this decision will be refined in later stages of this proceeding, consistent with the general approach we adopt today.

(D.16.08-024 at p. 21.)

The adopted process requires the submitting party to specify the basis for the allegation that the submission should be subject to confidential treatment and provide a declaration signed by an officer or officer-designated employee or agent. (*Id.* at p. 31.) Modified D.06-06-066 employs a Matrix for review of whether alleged market sensitive information is entitled to confidential protection. That decision provides:

> Because IOUs must show that information they seek to keep confidential could have a material impact on their market price for electricity, only data in the Matrix that meet this definition may be held in confidence. Several categories in the IOU Matrix do not meet this required showing, as shown in Appendix 1 to this decision. Where we find that the material is not "market sensitive," we require the data's public disclosure. Where some but not all related data require confidentiality protection, we specify the relevant data. Where the data have the potential, if released to market

> participants, to materially affect a buyer's market price for electricity, we require confidentiality of that data. The most sensitive data may require protection for five years, but cases of such protection in the IOU Matrix are rare. In most cases, we adopt a window of confidentiality for such data that protects it for three years into the future, and one year in the past at most.

(Modified D.06-06-066 at p. 44.)

B. Due Process Allegations

1. Notice and Opportunity to be Heard

The process adopted by the challenged decision requires the party submitting a purportedly confidential item to provide a signed declaration setting forth its request for confidential treatment. CITA contends that the process adopted by D.16-08-024 "does not guarantee [public] utilities notice and opportunity to be heard prior to . . . release" of confidential information. (CITA reh.app. at p. 4.) Citing various cases equating trade secrets to business' property rights, CITA alleges that the "procedures adopted by the Commission, allow its Staff to release documents that have been submitted to the Commission under a claim of confidentiality but without notice to and opportunity for the impacted party to be heard, violate public utilities' due process rights afforded under the U.S. Constitution" and the California Constitution. (*Id*. at p. 5.) Further, CITA argues that even though the docket is designated as legislative, the process adopted is not legislative (but, CITA argues, is adjudicative) and therefore, due process protections apply. (*Id*. at pp. 6-7.)

Joint applicants for rehearing argue that their due process rights are violated because D.16-08-024 "empowers Legal Division to disclose parties' confidential information without any notice or an opportunity to be heard." (Joint reh.app. at p. 22.) Absent specificity, CITA contends it has a "statutory interest" that guarantees the confidentiality of certain information it submits to the Commission. (CITA reh.app. at pp. 5-6.) However, a similar argument was rejected by the Ninth Circuit Court of Appeals in *Re Subpoena Served on California Public Utilities Commission v.*

Westinghouse Electric Corporation (9th Cir. 1989) 892 F.2d 778, as well as by this Commission in numerous decisions (discussed *infra*). Whether CITA is relying solely on two laws referenced in its footnotes, i.e., Evidence Code section 1060, or a provision of the California Public Records Act (CPRA), i.e., Government Code section 6254.15, or relying on some other law in alleging a guaranteed statutory interest in the confidentiality of certain information is unclear. Public Utilities Code section 1732 requires an application for rehearing to specifically set forth its allegations of error.

Joint applicants for rehearing contend they have "vested interests in their confidential information." (Joint reh.app. at pp. 31- 32.) In making arguments similar to CITA's, the Small LECs and Consolidated appear to rely on section 583, in addition to Government Code section 6276.36. (Joint reh.app. at pp. 11-14.) Section 583 provides:

> No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

Section 583 does not create any privilege of nondisclosure. (*Re Southern California Edison* (1991) 42 Cal.P.U.C.2d 298, 301 [D.91-12-019].) D.16-08-024 applies the Commission's long-standing interpretation of section 583 to all records submitted to the agency. (D.16-08-024 at p. 11.) Modified D.06-06-066 provides: "Section 583 sets forth a process for dealing with claims of confidentiality, and does not contain any substantive rules on what is and is not appropriate for protection. [footnote omitted.]" (Modified D.06-06-066 at p. 27.) In *Re Subpoena Served on California Public Utilities Commission*, *supra*, the Ninth Court of Appeals ruled: "The only privileges relating to documents in the possession of a government agency are those that protect the confidentiality of information supplied to agencies by private parties." (892 F.2d at

p. 782 fn. 4; and see e.g., *Re Pacific Bell* (1986) 20 Cal.P.U.C.2d 237, 252 [D.86-01-026])

In Attachment A to the August 11, 2015 Assigned Commissioner Scoping Memo and Ruling (hereinafter "ACR"), the Assigned Commissioner stated that the Commission addressed many of the legal issues the parties raise in this proceeding in R.05-06-040. (8/11/15 ACR at p. A-3.) And over a decade ago in R.05-06-040, the Commission held:

> We intend for parties to treat confidentiality designations with care. They must think about whether they are simply asking for confidentiality as a rubber stamp, or whether evidence truly needs protection. Thus, the requirement that parties show that their data meet the criteria we establish here must have teeth. If there are no consequences of overstating the need for confidentiality, we suspect parties will simply err on the side of asking that too many documents be held under seal. In order to ensure that parties make an honest effort to prove that documents meet the various legal definitions for confidentiality (e.g., for trade secrets or "market sensitive" information), *we will no longer allow parties to submit data under seal accompanied by boilerplate motions for leave to file under seal that do not address the specific documents at issue*.

(Modified D.06-06-066 at p. 66, emphasis added.)

To use CITA's example, if a document it will submit is one that it can prove is protected by the Uniform Trade Secrets Act, then under earlier Commission decisions, including those discussed herein, CITA must make an appropriate showing that the document is indeed entitled to statutory protection. Section "583 does not create for a utility any privilege that may be asserted against the Commission's disclosure of information or designate any specific types of documents as confidential." (General Order (GO) 167, § 15.4.2 pertaining to generating assets.) For example, Modified D.06-06-066 provides:

> As both courts and this Commission have stated in the past (and as reiterated in the OIR), § 583[ ] does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules. This is important because several of the parties claim that there is a legal presumption of confidentiality for all data. If this were true, the Commission would be legally obligated to protect whole swaths of information without first considering whether the information meets relevant legal tests for trade secrets, privilege, or other established provisions protecting data from disclosure.

(Modified D.06-06-066 at p 27.)

There is no merit in these arguments and they are not premised on what D.16-08-024 actually adopted.

2. Burden of Proof

GO 96-B, pertaining to Advice Letter submissions, provides:

> A person requesting confidential treatment under this General Order bears the burden of proving why any particular document, or portion of a document, must or should be withheld from public disclosure. Any request for confidential treatment of information must reference the specific law prohibiting disclosure, the specific statutory privilege that the person believes it holds and could assert against disclosure, the specific privilege the person believes the Commission may and should assert against disclosure, or the specific provision of General Order 66-C (or its successor) or other Commission decision that authorizes a document to be kept confidential.

(GO 96-B, § 9.2.)

GO 96-B was adopted by D.07-01-024 (in R.98-07-038). A variety of public utilities participated in the proceeding, including various Small LECs (i.e., Roseville, Calaveras, Cal-Ore, Ducor, Foresthill, and Ponderosa) and Surewest (i.e. Consolidated) in addition to other telecommunications, energy and water utilities. Under the general rules adopted by D.07-01-024 for the GO 96-B process, an

industry-related division reviews the assertions of confidentiality made in an Advice Letter (AL) filing by a utility, and:

> In the case where a protective order has not yet been issued, if the Industry Division determines that confidential treatment is warranted, review of the advice letter shall proceed in the normal fashion. If the Industry Division determines that confidential treatment is not warranted, then the Industry Division shall (a) proceed with review of the advice letter, and (b) attempt to informally resolve the dispute with the filing party. If the Industry Division and filing party are unsuccessful in resolving the dispute, the filing party shall be given 10 days, following Industry Division notification that confidentiality will not be afforded, to appeal the confidentiality issue to the Administrative Law Judge Division. Confidentiality will continue to be afforded while the appeal is pending.

(GO 96-B, General Rules, § 9.6.)

Section 583 merely "provides a process for handling information a party believes is confidential;" and "[n]othing in § 583 gives utilities a substantive right to confidential treatment for any type of information." (Modified D.06-06-066 at p. 29.) The process adopted by the challenged decision merely requires the party requesting confidential treatment, to prove why, e.g., by providing information about which law(s) confer a privileged protection upon such information, via a declaration accompanying the submission of the requested confidential information. (D.16-08-024 at p. 31 Ordering Paragraph No. 1(a).) Nothing about the process fails to provide protection for information that the party proves deserves confidential treatment, whether pursuant to the Evidence Code or some other relevant law or legal reason. The utilities have been on notice for a lengthy period of time that merely submitting information labeled "proprietary," "confidential" and/or "583" without providing the legal rationale for the claimed privilege affords the item no confidentiality protection. (D.05-04-030 (modifying D.04-08-055) at p. 20; D.91-12-01, *supra*, 42 Cal.P.U.C.2d at p. 302; *Re Sierra Pacific Power Company*, *supra*, 20 Cal.P.U.C.2d at p. 11.) And nothing in

D.16-08-024 permits the disclosure by Legal Division of information that is subject to appropriate confidentiality protections. The allegations are without merit.

C. Delegation of Discretionary Authority Allegations the Description does not Amount to Legal Error

The challenged decision provides:

> A key part of the proposed process is the Commission's delegation of authority to the Commission's Legal Division (under the direction of the Commission's General Counsel) to handle CPRA requests for documents. Under that delegated authority, Legal Division could determine whether records submitted should remain confidential, potentially without further formal action by the full Commission.

(D.16-08-024 at p. 12.)

The above language merely explains the existing practice of the Legal Division to review legal allegations; it is not some new process that involves delegation of authority to Legal Division. The General Counsel and the Commission's attorneys in the Legal Division are the Commission's legal advisors; no authority need be delegated to the Commission's attorneys in order for them to provide legal advice to the Commission, and/or any Commissioner. The Commission's attorneys' statutory duty is to, among other things, provide legal advice to the Commission, and as a practical matter, that includes advice as to whether or not information is subject to any privileges and/or should be withheld from public disclosure. (§ 307(b).) For example, whenever the Commission receives a subpoena seeking information in a Commission proceeding, or a CPRA request, it is the Legal Division attorneys who review the request and make recommendations to the Commission regarding disposition of the request. Nothing in D.16-08-024 changes this long-standing process.

The delegation language also appears in Attachment A to the August 11, 2015 ACR, pertaining to a draft proposal concerning CPRA requests. (8/11/15 ACR at p. A-9.) The ACR solicited comments on its proposals. Consequently, controversy arose based on terminology suggesting the Commission was delegating some

statutory authority to its attorneys. The methodology for reviewing claims of confidentiality is no different than it has generally always been, and D.16-08-024 actually has not unlawfully delegated any of its powers pursuant to section 583 (or any other law) to its Legal Division. There is no legal error caused by this perhaps inartful language.

However, we will modify D.16-08-024 to clarify any ambiguity and to make clear that we neither intended to, nor did delegate any of our statutory duties to the Legal Division. The modifications are set forth below.

1. Proposed Language for GO 66-D

The attachment to the OIR includes proposed language for GO 66-D as follows:

> If the Public Records Attorney determines that the requested records are disclosable pursuant to general legal authority but include information submitted to the Commission under a lawful claim of confidentiality, the Public Records Attorney shall prepare a draft resolution determining whether to disclose the records, for public review and comment pursuant to Pub. Util. Code § 311(g) and Rule 14.5 of the Commission's Rules of Practice and Procedure. The Commission shall serve the draft resolution on the requestor and any person whose information would be disclosed if the request is granted, if such person's contact information is available upon a reasonable and diligent search. The requestor, and any person whose information would be disclosed if the request is granted, may comment on the draft resolution.

(R.14-11-001, Attachment at p. 2.)

CITA contends that because the Commission's attorneys will review allegations that submitted information is entitled to be withheld from the public, the decision violates section 583. The joint applicants for rehearing argue that permitting confidential documents to be released without Commission authorization violates section 583. Again, neither of these claims appear to be based on what D.16-08-024 actually did. The challenged decision does not adopt GO 66-D and the proposed language does not run afoul of section 583.

Merely labeling information "583" and/or "confidential" does not by *ipsi dixit* make it legally entitled to being withheld from the public record. Under the process adopted by the challenged decision, the submitting party must identify, under penalty of perjury, what law supports its argument that certain information is entitled to protected status. Just as the Commission determined in Modified D.06-06-066 and numerous other decisions, the submitting party cannot merely rely on section 583 as a catchall rationale for withholding the information from the public. "Section 583 does not provide a substantive basis for keeping data confidential." (Modified D.06-06-066 at p. 26.) In *Re Southern California Edison* (1991) 42 Cal.P.U.C.2d 298 [D.91-12-019], the Commission stated:

> Section 583 does not create for a utility any privileges of nondisclosure. Nor does it designate any specific types of documents as confidential. To justify an assertion that certain documents cannot be disclosed, the utility must derive its support from other parts of the law.

(42 Cal.P.U.C.2d at p. 301.)

The Commission continued:

> Further, simply citing [s]ection 583 does not establish the confidentiality of a document. Section 583 does not discuss or define confidentiality, nor establish any privileges. In order to protect documents that would otherwise be released pursuant to [s]ection 583, the utility must find its authority or relevant policy elsewhere.

(*Id*. at pp. 302-303.)

All public utilities operating in California, including telephony utilities like the applicants for rehearing, have been on notice for quite some time: "Section 583 does not limit our ability to disclose information." (D.05-04-030 (modifying D.04-08-055) at p. 20.) As has always been the case, under the process adopted by D.16-08-024 information that is not entitled to confidentiality protection is not confidential. There is no legitimate basis for withholding non-privileged, or otherwise legally exempt information from the public. (D.05-04-030 (modifying D.04-08-055) at p. 20;

D.91-12-019, *supra*, 42 Cal.P.U.C.2d at p. 301.) Nor is there any law that only the Commission or a Commissioner may release public information.

As previously discussed, information merely labeled "confidential" and/or "583" without providing under penalty of perjury, the legal rationale for the claimed privilege affords the item no confidentiality protection, and in line with Commission precedent, such an item is not confidential information. The challenged decision correctly provides that the Commission's reviewing attorneys may release information (indeed, there is no law that prohibits any Commission staffer from making public non-confidential information). Nothing in D.16-08-024 violates section 583 or any other law or Commission precedent. This is a process the Commission has always followed. If the submitting party seeks to keep information it believes is legally entitled to protection from public disclosure:

> [It] must be marked as confidential, the basis for confidential treatment must be specified, and the request for confidentiality must be accompanied by a declaration signed by an officer of the requesting entity or by an employee or agent designated by an officer.

(D.16-08-024 at p. 31 Ordering Paragraph No. 1(a).)

As discussed above, the process challenged in these rehearing applications for releasing information that the submitting entity has failed to prove is entitled to confidential treatment is no different than the process that the Commission has always followed and clearly articulated. (E.g., D.86-01-026, *supra*, 20 Cal.P.U.C.2d at p. 252; D.91-12-019, *supra*, at 41 Cal.P.U.C.2d at pp. 302-303.) No information proven to be entitled to confidential protection is automatically subject to public release under the guidelines adopted in D.16-08-024. Allegations that the Commission has relinquished its mandatory duty are without merit.

D. Allegation the Decision Exceeds the Scope of Proceeding and Conflicts with Case Law

1. The Decision Does not Exceed the Proceeding's Scope

The Small LECs and Consolidated base their argument on the theory that the challenged decision delegates to the Legal Division authority to make confidential information public. The joint applicants for rehearing also argue that the challenged decision "purports to enable Legal Division to establish the confidential or public status of *all* documents, whether they have been requested through a CPRA request or not." (Joint reh.app. at p. 18, emphasis retained.)

As discussed in section 2 above, not only were revisions to GO 66-C (i.e., proposed GO 66-D) provided as an attachment to the OIR, Legal Division review of allegations that submitted information should be subject to confidential treatment has been a primary element of this rulemaking from the start. And, whether Legal Division attorneys may review all submitted information claimed to be subject to confidential treatment was contemplated in the language of the August 11, 2015 ACR, to which the parties submitted comments. Further, the items within the scope of Phase 1 of this rulemaking are as follows:

1. Are documents submitted to the Commission subject to disclosure unless deemed exempt from disclosure by the PRA or other law?
2. Is the proposed GO 66-D lawful and appropriate?
3. Does the proposed GO 66-D comport with § 583 of the Public Utilities Code?
4. Should the Commission provide notice to submitters that their documents are to be disclosed?
5. Is the procedure for resolving public records requests adequate?
6. Should there be a fee waiver?
7. What is the effect of the proposed GO 66-D on documents already submitted to the Commission?

8. Does the proposed GO 66-D improve public access to public records?

(8/11/15 ACR at pp. 2-3)

The scope of the proceeding was not limited to Legal Division review of documents that are alleged to be confidential for purposes of CPRA requests. The joint applicants for rehearing err in arguing that the first issue set forth in the scoping ruling pertains exclusively to CPRA requests. The CPRA sets forth the People's interest, and therefore this agency's interest, in open government, and is relevant to resolution of the issue of whether purportedly confidential information submitted to the Commission (in whatever manner it is submitted) is actually confidential and/or exempted from disclosure and subject to protection. Its relevance pertains whether the requester submits a subpoena, data request, or a CPRA demand, or some other form of request demanding that the Commission provide information; and it clarifies that items that are privileged and/or otherwise exempt may be kept confidential by this agency. Indeed, in most cases, information submitted to the Commission is generally done so during some proceeding. If, for example, a CPRA request is later made, whether during the pendency of a proceeding or thereafter, seeking public release of information withheld from the Commission's public records, a decision will, or should, have already been made as to whether the information is protected by a privilege and held confidentially. We will then determine whether there is good cause to find the information is exempt under the CPRA; rather than having to first determine (after the fact) whether the information should have been withheld in the first place. As a result, the Commission will be much better positioned to respond more quickly to CPRA requests as envisioned by the Act.

Further, other items set forth in the August 11, 2015 scoping ruling are not restricted to CPRA requests. Moreover, the allegation of joint applicants for rehearing that the scoping ruling did not pertain to the submission of documents fails by the plain language of the August 11 ACR. (Joint reh.app. at p. 25.) The very first issue listed in the scoping memo pertains to the submission of documents. The questions posed in the August 11 scoping ruling pertain to information submitted to the Commission. (8/11/15

ACR at pp. 2-3.) (An amended scoping memo and ruling issued on December 30, 2016.) In addition, the August 11, 2015 ACR included, as Attachment A, a draft proposal regarding a possible OIR concerning the CPRA. By Ordering Paragraph Number 5, parties in R.14-11-001 were required to file comments on that proposal. (8/11/15 ACR at p. 7.) Pursuant to page A-6 of the proposal: "Concomitant with the Commission's determination of the appropriate process for improving the public's access to public records is the need to determine the appropriate process for parties to submit records that such parties ('submitters' or 'record submitters') claim require protection from disclosure." And at page A-7, "the burden of identifying confidential information and of explaining the legal basis for confidentiality should rest with the record submitter. . . ." Thereafter, the proposal sets out proposed requirements for the submission of information. (8/11/15 ACR at pp. A-7-A-8.)

D.16-08-024 does not reach any conclusions that are outside the scope of this rulemaking proceeding. Unlike the cases relied on by the joint applicants for rehearing, *Southern Cal. Edison v. Pub. Util. Comm.* (2006) 140 Cal.App.4th 1085, 1106, and *City of Huntington Beach v. Pub. Util. Comm*. (2013) 214 Cal.App.4th 566, 592, no enlargement of the scope of the proceeding occurred. The allegation is without merit.

2. The Decision Does not Conflict with Decisional Law

The joint applicants for rehearing argue, incorrectly, "This proceeding simply was not about the manner in which documents are submitted; it was about the manner in which documents would be reviewed and potentially released in response to CPRA requests." (Joint reh.app. at pp. 25-26.) The attachment to the OIR is a proposed GO 66-D, providing a procedure to obtain public records pursuant to CPRA requests. The OIR asks, among other things, "What categories of documents (both safety-related and non-safety-related) should the Commission disclose, if any, in response to a CPRA request without a vote of the Commission." (R.14-11-001 at p. 5.) The answer to that question depends entirely on whether the information at issue is subject to any confidential protection.

The vast amount of information submitted to the Commission constitutes public records; and that information is generally to be made available to the public to view at all times during the regular office hours of this agency. (Gov. Code, § 6253(a).) However, some of that information may be exempt from disclosure by express provisions of law (whether that public disclosure takes place in a proceeding or via a subpoena or CPRA request). (Gov. Code, § 6253(b).) But even if privileged or otherwise subject to an exemption, the public interest in its disclosure may outweigh any interest in keeping it from the public. This is true whether or not a demand for its disclosure is made in a data request or through the Public Records Act.

The OIR makes clear that this proceeding was always about how information is submitted because it is at the point that information is submitted to this agency that it becomes a public record. The CPRA provides numerous exemptions that may be applicable as to whether a public record or portion thereof should be withheld from public disclosure. Nevertheless, the burden is and always has been on the submitting party to prove in the first instance whether the information constitutes the type of information that may be "exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Gov. Code, § 6254 (k); accord Resolution ("Res.") L-290 at pp. 3-4 [2000 Cal. PUC LEXIS 1087]; Res. L-289 at p. 4 [2000 Cal. PUC LEXIS 1086 at *3].) If the submitted information, which is a public record by virtue of having been submitted to a public agency, is legally privileged and/or entitled to some exemption and the agency has not made it available to public inspection and a request for its inspection/release is made, the burden then is upon the public agency to "justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Gov. Code, § 6255 (a); *New York Times v. Superior Court* (1990) 218 Cal.App.3d 1579, 1585; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d

762, 780.) Nothing about the outcome of the challenged decision is in conflict with decisional or statutory law.

The error joint applicants for rehearing make is that they continue to advocate that by merely labeling any information submitted to the Commission as "confidential" and/or "583," that alone confers confidentiality protection. It does not and never has. Joint applicants for rehearing seemingly misunderstand the law. Further, the Commission informed the Small LECs in 2005 that it rejected such an "absurd" situation where items merely labeled "confidential" or "583" were automatically conferred confidential status. (D.05-04-030 at p. 21.) The allegation is without merit.

E. Allegation that the Challenged Decision Ignores the Commission's Responsibilities Under the CPRA

Like the preceding argument, this allegation is based on a notion repeated by joint applicants for rehearing that merely marking information as "confidential," or "583" without meeting the burden of proving the legal reason(s) that the submitted information is subject to confidentiality protections, is enough to confer protection on any submitted information. In presenting this argument, joint applicants for rehearing are essentially challenging past Commission decisions concerning the breadth of section 583. Nothing about the Commission's precedential decisions finding that section 583 does not create any privilege of nondisclosure has been shown to be erroneous. (*Re Southern California Edison*, *supra*, 42 Cal.P.U.C.2d at p. 301 [D.91-12-019]; D.05-04-030 at p. 21.) And to the extent the applicants for rehearing are collaterally attacking previous Commission decisions and/or making untimely allegations of error in previous Commission decisions, they are precluded from doing so. (§§ 1709, 1731; and see, *People v. Western Air Lines* (1954) 42 Cal.2d 621, 630, appeal dismissed 348 U.S. 859 (Commission's determinations have conclusive effect of res judicata as to issues in subsequent proceedings between the same parties).) Also, in the event the Commission determines to release information shown to be confidential, as noted *supra*, in footnote 7, public release of information that is confidential under section 583 is discretionary. (Gov. Code, §§ 6276, 6276.36.) Here, however, we are dealing with information that has

not been shown to be subject to any confidentiality protections, and therefore, is not subject to section 583. As such it is part of an open public record and the public's access to it is not, and should not be, restricted. The allegation of joint applicants for rehearing that the Legal Division will be adjudicating whether to release confidential documents and doing so without any notice or opportunity for comment is not an outcome envisioned or approved by D.16-08-024.

Joint applicants for rehearing also argue that because the burden under the CPRA is on the agency to balance the public interest in disclosing confidential information to the public, that the challenged decision has erroneously shifted the burden onto the submitting parties "who may have originally submitted documents that are later the subject of a CPRA request." (Joint reh.app. at p. 31.) However, that is a misreading of both the decision and the CPRA, and fails to acknowledge that legally the burden is on the submitting party to prove that any purportedly confidential information is in fact privileged. Because submitted non-privileged, non-protected information is a matter of the public record, the allegation is without merit.

F. Allegation that D.16-08-024 Modifies Rule 11.4

Joint applicants for rehearing contend that the challenged decision impermissibly modifies rule 11.4. Rule 11.4 pertains to motions for leave to file information under seal, and provides:

> (a) A motion for leave to file under seal shall attach a proposed ruling that clearly indicates the relief requested
>
> (b) Responses to motions to file pleadings, or portions of [a] pleading, under seal shall be filed and served within 10 days of the date that the motion was served.

(Rule 11.4.)

As discussed above, it has been the practice of the Commission that requests for confidential treatment accompany motions, though rule 11.4 does not require such motions be verified. Rule 11.4 motions for leave to file under seal pertain to open proceedings. (Motions are described in rule 11.1(a), "A motion is a request for the Commission or the Administrative Law Judge to take a specific action related to an open

proceeding before the Commission.") While some of the overall information submitted to the Commission is done in an open proceeding, not all of it is. Further, D.16-08-024 does not modify rule 11.4, and thus, there was no reason for the Commission to provide notice that the rule would be modified.

Nothing in the guidelines adopted by D.16-08-024 prohibits a party from filing a motion to seal information that may be considered confidential. But whether filing a motion, or merely filing a declaration in a non-open proceeding, the party must prove that the information is entitled to confidential treatment. The submitting party may undertake to meet its burden of proof at the time of submission or prior to that; nothing about D.16-08-024 directs the submitting party when to undertake its burden of proof, though it is reasonable to think that if a party believes items to be submitted should be treated as confidential, it will undertake to prove that at or prior to the time of submission. The difference under the D.16-08-024 guidelines is that the submitting party must now include a declaration with its submission. The guidelines do not conflict with rule 11.4, contrary to the allegation of joint applicants for rehearing. (Joint reh.app. at p. 26.) And contrary to their argument it is not and never has been "reasonable" to mark information as confidential that is not entitled to such protection.

Further, contrary to allegations made by the joint applicants for rehearing, Attachment A specifically says that the guidelines do not apply in a formal proceeding. (8/11/15 ACR at p. A.9.) Nevertheless, the December 30, 2016 ACR has stated that this issue will be addressed Phase 2a of this proceeding. (12/30/16 ACR at p. 3.) Therefore, we shall not prejudge this issue and there is no need to further address it here.

G. Allegation that the Submission Requirements are Arbitrary and Capricious and not Supported by Sufficient Findings of Fact

Joint applicants for rehearing contend that D.16-08-024 failed to consider the burden placed on submitting parties if they must explain why information submitted is entitled to confidential treatment. This argument is premised on the erroneous concept

that information merely marked as "confidential" is in fact confidential. As discussed above, this is not accurate and the allegation is without merit.

Joint applicants for rehearing contend that information submitted electronically cannot reasonably be marked as confidential. (Joint reh.app. at p. 28.) This allegation makes no sense and is without merit.

Joint applicants for rehearing argue that the reasoning at page 25 of D.16-08-024 concerning information that is unusually complex or voluminous is an acknowledgement that the guidelines are "overly rigid." In discussing comments made by other parties, the challenged decision provides:

> Several parties note that certain types of records and information, such as those that are unusually complex or voluminous, may present difficulties in identifying and marking confidential information, and accordingly there may need to be exceptions to the confidentiality designation rules set forth in the proposed decision . . . This would be an appropriate refinement to consider in this proceeding going forward. In the meantime, to the extent that such records or information are being presented in response to a Commission data request, the submitting entity can request additional time to comply with the request.

(D.16-08-024 at pp. 24-25.)

The above is merely a review of comments made by various parties and an acknowledgement that their suggestions may be appropriate at some future time (e.g., during Phase 2), but that for the time being, with respect to data requests, an entity alleging confidentiality of responsive information may request additional time to comply with the data request. The above dicta is a common sense approach, and nothing in the above dicta is an acknowledgement that we consider the adopted guidelines to be unreasonable or, as joint applicants for rehearing contend, "overly rigid." Joint applicants for rehearing have not established the dicta is unreasonable or otherwise unlawful. The allegation is without merit.

Joint applicants for rehearing argue that the challenged decision fails to explain how the guidelines could expedite the exercise of the Commission's statutory

duties, contending that the CPRA is unrelated to how documents are marked. (Joint reh.app. at p.28.) Findings of Fact Numbers 4, 5, and 6 provide:

> 4. The current practices for submitting potentially confidential documents to the Commission have placed unnecessary burdens on Commission staff and have delayed Commission responses to Public Records Act requests.
> 5. Implementing a consistent process for the marking of potentially confidential documents submitted to the Commission would improve the ability of the Commission to respond in a timely manner to Public Records Act requests.
> 6. Requiring that potentially confidential documents submitted to the Commission specify the basis for confidential treatment would improve the ability of the Commission to respond in a timely manner to Public Records Act requests.

(D.16-08-024 at pp. 29-30.)

Further, we addressed the same argument at pages 13-14 of the challenged decision:

> Under [this] approach, if an entity submitting information marked a blank page or a public SEC filing or newspaper article as confidential, it could only be released upon a formal vote of the full Commission. The Commission could not determine in advance that those kinds of documents do not deserve confidential treatment. And it is quite possible that filings marked confidential would actually contain such clearly public records, as CIC also argues that it should be able to claim confidentiality for large documents that may only contain small amounts of confidential material, and that it should not be required to provide a specific basis for any claim of confidentiality at the time it submits documents to the Commission. [Citation.]
>
> In other words, an entity that submitted 10,000 pages of documents could mark all of them as confidential without reviewing each page to determine whether or not it contained confidential information, but the Commission would have to look at each and every page before releasing it. This would

> make things simpler and easier for utilities and other entities that submit information, but it places all of the burden of reviewing documents on the Commission and its staff. This is neither fair nor efficient, as it relieves the entity claiming confidentiality for stating (or even having) a basis for its claim, places the heaviest burden of determining confidentiality on Commission staff (who did not mark it as confidential and may not know why it should be kept as confidential), and unnecessarily delays the release of public records.

Contrary to joint applicants for rehearing, the above rationale clearly "explains how submission designations could expedite the exercise of statutory duties" placed on the Commission. (Joint reh.app. at p. 28.) Nevertheless, the joint applicants for rehearing argue that the record contains "no evidence of . . . burdens or delays" placed on the Commission as a result of utilities marking as confidential information that is not entitled to protection. (*Id.* at p. 29.) Consequently, joint applicants for rehearing argue the findings and conclusions are not supported by the record. Their argument is undermined by the basic facts of this proceeding.

First, the purpose of this proceeding is to improve access to public records held by this agency. Secondly, the Commission has previously stated that: "All too often, the absence of clear and consistent rules for processing records requests and requests for confidential treatment outside formal CPUC proceedings results in confusion regarding the public or confidential status of records and information." (Res. L-436 at p. 3.) And in addition to reciting the various legal requirements that the public have easy access to public records, the OIR also states that GO 66-C is "outdated," and proposes a revised GO. (R.14-11-001 at p. 4.) Further, Attachment A at page A-7 recounts some of the burdens and delays caused by the current situation:

> The Commission's Legal Division staff must engage in the often burdensome task of parsing each document to determine which discrete portions are truly confidential. Accordingly, overbroad assertions of confidentiality not only shift the submitter's burden of proving confidentiality to the Commission, but also delay the Commission's response to PRA requests.

> Moreover, there is an information and knowledge disparity: the parties who submit the records know those records and their contexts better than the Commission's Staff does. Where the Commission's Staff must by default perform the work that the submitters are in the best position to effectively and efficiently perform (that of identifying confidential data and explaining the need for withholding from public disclosure), parties increase the risk that Staff will inadvertently incorrectly classify non-confidential information as confidential, or confidential information as non-confidential.

Also, in calling for a more streamlined and transparent process, the Commission's Office of Ratepayer Advocates (ORA) reveals in comments the arduous process the public has been subjected to in trying to obtain public records. (E.g., 9/25/15 ORA comments at p. 6; and 12/22/14 comments at p. 3.) The City of San Bruno is a party to this proceeding. In its comments, San Bruno discusses burdens and delays it has faced in attempting to obtain public records from this agency. (12/22/14 San Bruno comments at p. 1.) Another party, TURN, argued:

> From TURN's perspective as a consumer representative, the public does not have appropriate access to information submitted by regulated entities -- particularly those in the communications industry. To the contrary, TURN would expect that the experience of interested members of the general public, including the media, would be no better than that of TURN, a regular Commission practitioner. Among other problems, TURN does not even know the full scope of information that is being provided to the Commission, a particular problem with communications industry information, and (2) finds the process for seeking records of information provided by regulated entities outside of a formal proceeding to be opaque, cumbersome, slow, and frustrating. The frustration often results from blanket assertions of confidentiality by regulated entities, which Commission staff feel obliged to honor, lest they be charged with a misdemeanor under . . . Section 583. . . [¶] The Draft Proposal is an important effort by the Commission to increase the transparency of the Commission's exercise of its critical regulatory responsibilities.

(9/25/15 TURN comments at pp. 3-4.)

Accordingly, we find that there was more than adequate information in the record to support the findings and conclusions. Thus, the allegation is without merit.

H. Request for Oral Argument

Joint applicants for rehearing request oral argument. Oral arguments pertaining to rehearing matters are discretionary and governed by rule 16.3. The request "should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission . . . ." (Rule 16.3(a).)

Joint applicants for rehearing contend that the challenged decision creates a new paradigm for release of documents, but as discussed above, it does not. They argue that D.16-08-024 effectuates a fundamental change in precedent that conflicts with section 583; however, as discussed *supra*, that is not the case. They allege that the challenged decision touches upon profound issues of public importance concerning information that in many cases has been "provided involuntarily pursuant to the Commission's authority over public utilities." (Joint reh.app. at p. 30.) Yet, for the reasons discussed herein and in the challenged decision, the guidelines are merely guidelines and the utilities' reluctance to providing information to the Commission is hardly a sufficient reason to grant oral argument—they are regulated entities who are lawfully required to provide information. In addition, joint applicants for rehearing argue this is an issue of first impression, however, there have been many decades of the Commission addressing arguments similar if not identical to those raised herein, and this matter does not suggest a case of first impression. The joint applicants for rehearing have not met any of the four criteria listed in rule 16.3. Accordingly, joint applicants for rehearing have not presented good cause for the grant of their request and oral argument is denied.

III. CONCLUSION

Having reviewed each and every allegation of error raised by CITA and the joint applicants for rehearing, we conclude good cause has not been established for granting a rehearing. However, we will modify D.16-08-024 to clarify our discussion regarding Legal Division's responsibility for reviewing documents to determine whether they should or should not be confidential. Rehearing of D.16-08-024, as modified, is denied.

THEREFORE, IT IS ORDERED that:

1. Decision 16-08-027 is modified as follows:
   a. At page 12, the first sentence in the second paragraph is modified to delete the phrase "delegation of authority" and add in its place the word "assignment".
   b. At page 12, the second sentence in the second paragraph is modified to delete the phrase "delegated authority" and add in its place the word "assignment".
   c. At page13, the second full paragraph is modified to add the following sentence to the end of that paragraph: "Although various parties support and/or oppose the idea of a delegation of authority, there is no reason or need for us to delegate our authority in order for the Legal Division to provide us with legal advice regarding the matters at issue here or any other matters."
   d. At page 17, the second full paragraph is deleted in its entirety. The following is added in its place: "As we have previously stated, we do not need, nor do we intend, to delegate any of the Commission's authority to the Legal Division in order for our attorneys to perform their duties and/or provide us with legal advice regarding confidentiality and/or related matters."
   e. At page 30, Finding of Fact Number 8 is modified to delete the word "delegating" and adding the word "assigning" in its place.
   f. At page 30, Conclusion of Law Number 3 is modified to delete the word "delegated" and adding the word "assigned" in its place.

g. At page 31, Ordering Paragraph Number 2 is modified to delete the word “delegated” and adding the word “assigned” in its place.

2. Rehearing of Decision 16-08-027 as modified, is denied.

3. The request for oral argument is denied.

4. This proceeding remains open.

This order is effective today.

Dated May 25, 2017, at San Francisco, California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners